Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

HALLCO MANUFACTURING, CO., INC.
and OLOF A. HALLSTROM, *Petitioners*,
v.
RAYMOND KEITH FOSTER, KEITH MFG. CO.,
INC. and KEITH SALES CO., *Respondents*.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

Peter E. Heuser
Counsel of Record
David A. Fanning
Kasey C. Christie
KOLISCH HARTWELL DICKINSON
McCORMACK & HEUSER
520 S.W. Yamhill St., Suite 200
Portland, OR 97204
(503) 224-6655
Attorneys for Petitioners

October 28, 1994

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QUESTIONS PRESENTED

1. Whether a trial court should grant a motion for relief from judgment either under Rule 60(b)(3), for reason of fraud, misrepresentation, or other misconduct, or under the "fraud on the court" saving provision of Rule 60(b), where there is uncontroverted *prima facia* evidence that an adverse party willfully altered a key trial exhibit and that such misconduct affected the trial.

2. Whether, on a motion to set aside judgment under the "fraud upon the court" saving provision of Rule 60(b), it is permissible for a trial court to give no weight to a jury verdict that an adverse party "willfully" altered a key trial exhibit "in an attempt to mislead the court and jury."

PARTIES TO THE PROCEEDING

All parties to the proceeding in the Court of Appeals are identified in the caption.

RULE 29.1 LISTING

Pursuant to Supreme Court Rule 29.1, Petitioners state there are no parent or subsidiary companies to be listed.

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A. Because of the absence of decisions from this Court

regarding Rule 60(b)(3) and the "fraud upon the court" saving provision of Rule 60(b) of the Federal Rules of Civil Procedure, this case provides an opportunity to provide needed instruction to the lower courts that the presentation of uncontroverted *prima facia* evidence showing fraud requires a trial court to rule that the non-moving party engaged in "fraud upon the court" under Rule 60(b) or fraud, misrepresentation, or other misconduct under Rule 60(b)(3). 9

B. This Court should accept and reverse the judgment in this case to prevent the public from losing faith and confidence in the federal judicial system, caused by a trial court's complete disregard of a jury verdict holding that a party had willfully altered a key trial exhibit. 15

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HALLCO MANUFACTURING, CO., INC.
and OLOF A. HALLSTROM, *Petitioners*,

v.

RAYMOND KEITH FOSTER, KEITH MFG. CO.,
INC. and KEITH SALES CO., *Respondents*.

On Petition For A Writ Of Certiorari
To The Unites Stated Court Of Appeals
For The Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioners Hallco Manufacturing, Co., Inc. and Olof A. Hallstrom ("Hallco"), petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

I. OPINIONS BELOW

The opinion of the Court of Appeals (App., *infra*, 1a) is not reported. The opinion of the district court (App., *infra*, 4a-7a) is not reported.

II. JURISDICTION

The United States Court of Appeals for the Federal Circuit entered its judgment on August 5, 1994 (App., *infra*, 1a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

III. STATUTE INVOLVED

Rule 60(b) of the Federal Rules of Civil Procedure provides in pertinent part:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: ...(3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;... [Saving provision:] This rule does not limit the power of a court ... to set aside a judgment for fraud upon the court.

IV. STATEMENT OF THE CASE

A. District Court Proceedings:

The plaintiffs (respondents in present action) in the declaratory judgment action, Raymond Keith Foster, Keith Manufacturing Co., and Keith Sales Co. (collectively "Foster"), contended that they did not have to pay royalties on their new Running Floor II conveyor (the "RF II") because such conveyor was not covered by any valid claim of the licensed patents of the defendants (petitioners in present action), Hallco Manufacturing Company Inc. and Olof A. Hallstrom (collectively "Hallco"). Hallco asked the court to rule that it had properly terminated the license agreement, and that Foster's sales of the RF II conveyor infringe the licensed patents [including U.S. Patent No. 4,143,760 ('760)]. The court ruled on summary judgment that the license agreement had been properly terminated by Hallco, and at trial the jury ruled that the '760 patent was infringed by Foster's RF II conveyor.

1. '760 Patent. Claims 1 and 4 of the '760 patent define a conveyor having a unique mode of motion referred to as the "1-2-3 mode," as distinguished from the older and well-known "inch mode." Under 35 U.S.C. § 102(b), a patent is invalid if the patented invention was publicly used

or on sale more than one year prior to the patent application's filing date.[1] Therefore, if Foster could have established, as it claimed it could, that Hallco was selling conveyors operating in the 1-2-3 mode more than one year prior to the January 10, 1975 filing date of the '760 patent, this would have gone a long way toward invalidating claims 1 and 4 of the patent.

2. Drive Unit PX 162. Foster contended that a conveyor system sold by Hallco to Foster in 1973, which was in turn installed in a trailer and sold by Foster to Arthur Wilkens, operated in the patented 1-2-3 mode of motion. Hallco agreed that the trailer in question was sold to Wilkens in 1973, but contended that its conveyor drive unit operated in the inch mode of motion and not the 1-2-3 mode of motion. To attempt to prove its point, Foster submitted into evidence a drive unit PX 162 that was installed in the Wilkens trailer in 1973 and that it claimed operated originally in the 1-2-3 mode of motion.

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[1] 35 U.S.C. § 102(b) is in pertinent part: "A person shall be entitled to a patent unless ... the invention was ... in public use or on sale in this country, more than one year prior to the [filing] date of the application for patent in the United States."

Hallco realized that PX 162 had been altered by Foster to operate in the 1-2-3 mode, so Hallco showed the jury DX 673, a drive with an inch mode of motion, and demonstrated what would have had to be done to modify the unit to operate in a 1-2-3 mode. Hallco also showed: (1) PX 162 includes milled out portions which correspond to similar portions found in the DX 673, and these portions would not have been necessary if PX 162 always operated in the 1-2-3 mode; (2) PX 162 includes a shiny spot where something had been ground off and which is where a cam plate would have been originally mounted if the unit operated in the inch mode and which would have had to be removed in order for it to operate in the 1-2-3 mode; and (3) Foster's expert Samuel Windsor testified that he inspected another drive unit shortly before trial which also operated in the 1-2-3 mode, thus showing that mode of operation alterations must have been made because Foster never contended that more than one of these original drives operated in the 1-2-3 mode.

Foster has never presented any explanation addressing the three points raised by Hallco showing the alteration of PX 162. Foster's counsel even admitted in his closing argument that he had no explanation for Hallco's evidence of alteration, when he said "we are

concerned" and "[i]t bothered me to see that."

Hallco presented evidence showing that its trial presentation was affected by Foster's misconduct. In particular, Hallco showed that rebuttal of the altered evidence became the primary focus of Hallco's efforts at trial, to the detriment of its defense of Foster's contention of patent invalidity as to the best mode requirement. Foster never contradicted Hallco's proof that its trial presentation was affected by Foster's misconduct.

3. Jury's Verdict. The jury found that Foster's RF II infringed the '760 patent, but that the '760 patent was invalid based upon a violation of the best mode requirement.[2] The jury also found "that Foster tried to willfully mislead the court and jury with respect to the drive unit, identified as plaintiffs' Exhibit 162, the drive unit which Foster contends represents the 1973 45-foot Wilkens drive unit."

4. Post-Trial Motion: Following entry of judgment, Hallco filed a timely motion for new trial pursuant to Rule 59

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[2] 35 U.S.C. § 112 requires in pertinent part: "The specification [of a patent application]...shall set forth the best mode contemplated by the inventor of carrying out his invention."

and for relief from judgment pursuant to Rule 60(b). Specifically, Hallco asked that the judgment as to invalidity based upon a best mode violation be set aside due to Foster's alteration of evidence relating to the 1973 conveyor drive unit PX 162. In that motion Hallco pointed out and Foster agreed that it was not necessary to prove that Foster's fraud affected the verdict, but only that it affected Hallco's trial of its case. The district court denied Hallco's motion. Hallco subsequently filed a request that the district court entertain a motion for relief under Rule 60(b), and the court indicated that it would deny that request.

In the denial of Hallco's motions, the court recited the applicable standard that it should use in determining whether to grant a Rule 60(b)(3) motion (App., *infra*, 5a). However, the court noted that since the jury found Foster's misconduct to be "willful" rather than base their verdict on the clear and convincing evidence standard (App., *infra*, 6a), it should give no credence to the verdict. The court also stated that the jurors were instructed to determine the true facts, were told that they could believe or disbelieve any part of the testimony of any witness, and if the witness had intentionally given false testimony in some part, they may distrust the rest of the person's testimony (App., *infra*, 6a).

The court concluded its Opinion with the statement that the trial tactics and strategy of Foster did not deny Hallco "an opportunity to fully and fairly present its case or defenses" (App., *infra*, 7a). The court plucked the quoted language from the cases cited by the parties to justify its denial of Hallco's motion, but its analysis of the jury instructions shows that the trial court was looking to the effect which the verdict had on the jury verdict and not on the effect it had on Hallco's trial of the case. Of equal importance is the fact that the court also failed to address the effect Foster's conduct had on the integrity of the judicial process, which is the required analysis under the Rule 60(b) saving provision.

B. **Court of Appeals Proceedings:**

Foster appealed to the Federal Circuit the patent infringement finding of the district court and Hallco cross-appealed the district court's failure to grant Hallco's post trial motion under Rules 59 and 60(b) that Hallco is entitled to a new trial with regard to compliance with best mode requirements because of Foster's willful alteration of a trial exhibit. The Federal Circuit summarily affirmed the district court in a *per curiam* judgment without opinion.

V. REASONS FOR GRANTING THE PETITION

A. Because of the absence of decisions from this Court regarding Rule 60(b)(3) and the "fraud upon the court" saving provision of Rule 60(b) of the Federal Rules of Civil Procedure, this case provides an opportunity to provide needed instruction to the lower courts that the presentation of uncontroverted *prima facia* evidence showing fraud requires a trial court to rule that the non-moving party engaged in "fraud upon the court" under Rule 60(b) or fraud, misrepresentation, or other misconduct under Rule 60(b)(3).

In the forty-six year history of the current version of Rule 60(b)[3], the Supreme Court has *never* ruled on what standard the lower courts should use in determining whether to grant a motion under Rule 60(b)(3). Nor, since Hazel-

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[3] Rule 60(b) was promulgated by the Supreme Court in 1938 and it was amended in 1946 to include Rule 60(b)(3) and the "fraud on the court" saving provision. The 1946 amendment became effective in 1948.

Atlas Glass Co. v. Hartford Empire Co., 322 U.S. 238 (1944), has the Supreme Court elaborated on the application of the "fraud on the court" saving provision of Rule 60(b).

Rule 60(b)(3): Under Rule 60(b)(3), the courts have the power to grant a motion for relief from judgment when an adverse party is guilty of fraud, misrepresentation or other misconduct, but courts are left without guidance as to when to exercise this power. The First Circuit noted that the text of Rule 60(b)(3) gives "precious little guidance as to how a court should ascertain the existence of misconduct, weigh its effect, and ultimately determine when to provide relief from a judgment." Anderson v. Cryovac, Inc., 862 F.2d 910, 923 (1st Cir. 1988).

In the absence of guidance from this Court, at least six of the circuits -- specifically, the 1st, 3d, 4th, 5th, 9th, and 11th Circuits -- have established some guideposts to determine when to grant a motion under Rule 60(b)(3). The movant must:

1. demonstrate by clear and convincing evidence that the verdict was obtained through fraud, misrepresentation, or other misconduct; and

2. show that the misconduct prevented the movant full and fair preparation or presentation of its case.

Jones v. Aero/Chem Corp., 921 F.2d 875, 878 & (9th Cir. 1990); Harre v. A.H. Robins Co., 750 F.2d 1501, 1503 (11th Cir. 1985); Stridiron v. Stridiron, 698 F.2d 204, 207 (3d Cir. 1983); Square Construction Co. v. Washington Metropolitan Area Transit Authority, 657 F.2d 68, 71 (4th Cir. 1981); Rozier v. Ford Motor Co., 573 F.2d 1332, 1339 (5th Cir. 1978); Anderson, 862 F.2d at 926.

However, no court has ever said whether uncontroverted *prima facia* evidence demonstrating fraud or misconduct requires that a Rule 60(b)(3) motion be granted. The question left completely unanswered, even by those circuits which have established Rule 60(b)(3) guideposts, is whether the presentation of uncontroverted *prima facia* evidence demonstrating fraud or misconduct requires the granting of a Rule 60(b) motion, or whether a court can, in its discretion, completely ignore uncontroverted evidence offered to prove fraud.

This case presents an opportunity for this Court to adopt a universal standard for the lower courts to follow regarding Rule 60(b)(3). The two-prong test for deciding Rule 60(b)(3) motions adopted by at least six of the circuits is a logical

and reasonable standard. However, the test needs clarification or supplementation for which this case is ideally suited. Specifically, this Court can rule that if no evidence is presented by an adverse party to contradict the *prima facia* evidence of the movant, then the two-prong test is satisfied and the motion should be granted.

The corollary or clarification of the two-prong test is somewhat akin to the summary judgment standard except that the court is given additional guidance because the determination is made after the presentation of all of the evidence and after the jury has rendered its verdict. Therefore, upon a motion for relief under Rule 60(b)(3), a court may make a preliminary determination whether the movant has made a *prima facia* case that a verdict was obtained through misconduct and that the misconduct affected the trial of the movant's case. If the adverse party has failed to present any evidence contradicting the movant's *prima facia* evidence, then the court must conclude that the test is satisfied and grant the motion. If, however, the adverse party has presented evidence contradicting the movant's evidence, then the court should weigh the evidence to determine if the two prongs have been proven by the movant.

Although the jury did not specifically use the clear and convincing

standard in finding Foster's misconduct, the court should have granted Hallco's motion for relief from judgment under Rule 60(b)(3) because Foster presented no evidence contradicting Hallco's *prima facia* evidence and the jury found that Foster's misconduct was willful. In addition, the district court's reliance on the jury instructions shows that the court failed to apply the appropriate standard by focusing on the effect of Foster's misconduct on the jury verdict rather than on Hallco's presentation of its case.

Saving Provision: Under the "fraud on the court" saving provision of Rule 60(b), inquiry into the second prong of Rule 60(b)(3) -- whether the misconduct foreclosed full and fair preparation or presentation -- is irrelevant. The sole focus is on whether the misconduct in question harms the integrity of the judicial process itself. In re Intermagnetics America, 926 F.2d 912, 917 (9th Cir. 1991); Hazel-Atlas, 322 U.S. 238, 246 (1944). Foster's alteration of physical trial evidence and testimony denying the alteration is a form of misconduct that harms the integrity of the judicial process itself.

On a motion under the "fraud on the court" saving provision of Rule 60(b), the court must determine whether the action of an adverse party harmed the integrity of the judicial process itself, based on

several factors. These factors should include the evidence presented by the movant, the evidence presented by the adverse party, and the jury's verdict. The motion should be granted when an adverse party presents no evidence contradicting the movant's *prima facia* evidence proving the misconduct. Furthermore, the motion should be granted when the jury finds that the same adverse party attempted to "willfully mislead" the court and the jury by altering the evidence.

The seminal case on this issue is Hazel-Atlas Glass Co. v. Hartford Empire Co., supra[4], in which "the Supreme Court granted relief though the complainant had waited nine years to bring the action and had learned about the possibility of fraud during the first proceeding." In re Intermagnetics, 926 F.2d at 916. Hazel-Atlas, like this case, was a patent infringement case. In Hazel-Atlas, as in this case, a litigant introduced fraudulent evidence. In Hazel-Atlas, as

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[4] Hazel-Atlas was decided four years before the effective date (1948) of the "fraud on the court" saving provision of amended Rule 60(b), but the Court's decision was based on the judicially-devised equitable predecessor of the "fraud on the court" saving provision of amended Rule 60(b). See 7 *Moore's Federal Practice* ¶ 60.33.

in this case, the litigant's chicanery was ultimately found out. In this case, as in Hazel-Atlas, this conduct should not be ignored.

Absence of Supreme Court Rulings on Rule 60(b): During the entire fifty-six year history of Rule 60(b), the Supreme Court has written only fourteen opinions or memoranda that substantively addressed Rule 60(b).[5] Of those cases, none have addressed Rule 60(b)(3) and only Hazel-Atlas in 1944 addressed the "fraud on the court" saving provision.

In order to perform its "supervisory authority" over the lower federal courts (see Florida v. Rodiquez, 469 U.S. 1 (1984)), this Court should accept the present case so that standards for deciding Rule 60(b) motions can be enumerated.

B. **This Court should accept and reverse the judgment in this case to prevent the public from losing faith and confidence in the federal judicial system, caused by a trial court's complete disregard of a jury verdict holding that a party had willfully altered a key trial exhibit.**

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[5] The list of the fourteen cases is found in Appendix C.

When the district court ruled on Hallco's motions after the trial, the court ignored the jury verdict that found "that Foster tried to willfully mislead the court and jury" by altering a key trial exhibit. The court also ignored Hallco's motion as to the "fraud on the court" saving provision of Rule 60(b).

As discussed *supra*, the district court misapplied the two-prong Rule 60(b)(3) standard and denied Hallco's Rule 60(b)(3) motion by relying on the absence of the clear and convincing evidence standard in the jury's verdict and the first prong's requirement of proving the effect of Foster's misconduct by clear and convincing evidence. Although the court's failure to address Hallco's "fraud on the court" motion and its disregard for the jury verdict is disturbing, one might surmise that if the court had actually considered the motion at all, it might have denied it for reasons similar to its denial of Hallco's Rule 60(b)(3) motion. However, this analysis cannot be correct because the two-prong Rule 60(b)(3) test is not the test used to determine whether to grant a "fraud on the court" Rule 60(b) motion.

The sole test is whether the misconduct in question harms the integrity of the judicial process itself. In re Intermagnetics America, 926 F.2d at 917; Hazel-Atlas, 322 U.S. at 246. The clear

and convincing evidence standard does not exist in this independent "fraud of the court" test provided by this Court in Hazel-Atlas. Therefore, not only should the district court have addressed Hallco's "fraud on the court" Rule 60(b) motion, but based on the jury verdict finding that Foster attempted to "willfully mislead the court and the jury," the court was required to grant Hallco's motion as a matter of law.

The district court's action, or inaction, demonstrates a lack of respect for the procedural rules of the judicial system, namely, the role of the jury as the fact-finder and its inaction is all the more disconcerting since the one of the basis for the provision is to foster the public's faith and confidence in our judicial system.

The judge and jury each have a primary role to play in the administration of justice. The trial judge's role is to assure the proper administration of justice based on the laws and rules of procedure. The jury's role is as the fact-finder. The jury listens to the best arguments of each side and decides what the facts are and what is the truth.

Once the jury has made determinations of fact, a trial judge's actions must be consistent with the jury's findings. If trial judges routinely disregard or ignore a jury's finding of fact, then the public

would have reason for concern. The public may eventually lose faith in the American system of justice because of judges' apparent usurpation of the jury's power by ignoring jury's fact findings.

This Court clearly acknowledged the importance of the public's perception of the justice system in Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847 (1988). After a judge's decision in a contract dispute, the losing party filed a motion under Rule 60(b)(6) to overturn the judgment because the trial judge should have disqualified himself. The judge had an affiliation with a third party who was involved in ongoing negotiation during trial with the prevailing party on the subject matter at the heart of the contract dispute. Justice Stevens said that "in determining whether a judgment should be vacated...it is appropriate to consider...the *risk of undermining the public's confidence in the judicial process*." Liljeberg, 486 U.S. at 864 (emphasis added). Quoting In re Murchison, 349 U.S. 133, 136 (1955), the Court said that we must continuously bear in mind that "to perform its highest function in the best way 'justice must satisfy the appearance of justice.'" Id.

In order for justice to satisfy the appearance of justice, it is important for this Court to utilize its supervisory function over the lower courts by hearing

this case to determine whether a trial court can give no weight to what should have been a binding jury verdict and refuse to rule or acknowledge a "fraud on the court" saving provision of Rule 60(b) motion based on the jury's verdict.

For these reasons, the decision below fully warrants this Court's review.

CONCLUSION

The Petition for a writ of certiorari should be granted.

Respectfully submitted,

Peter E. Heuser
Counsel of Record
David A. Fanning
Kasey C. Christie
KOLISCH HARTWELL
DICKINSON McCORMACK
& HEUSER
520 S.W. Yamhill St.
Suite 200
Portland, Oregon 97204
(503) 224-6655

Attorney for Petitioners
Hallco Manufacturing,
Co., Inc. and Olof A.
Hallstrom

October 28, 1994

APPENDICES

APPENDIX A
JUDGMENT OF THE COURT OF APPEALS
No. 88-CV-959

IN THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Nos. 94-1014, 94-1036

RAYMOND KEITH FOSTER, KEITH MFG. CO., INC., AND KEITH SALES CO., *Plaintiffs-Appellants*,

v.

HALLCO MANUFACTURING CO., INC., OLOF A. HALLSTROM, *Defendants/Cross-Appellants*.

On Appeal from the United States District Court for the District of Oregon, No. 88-CV-959. D. Or. Affirmed.

DECIDED August 5, 1994.

Before NIES, Circuit Judge, SKELTON, Senior Circuit Judge, and RADER, Circuit Judge.

JUDGMENT

PER CURIAM.

AFFIRMED. See Fed. Cir. R. 36.

APPENDIX B
OPINION OF DISTRICT COURT
Civ. No. 88-959-FR.

IN THE UNITED STATES DISTRICT COURT, D. OREGON

RAYMOND KEITH FOSTER, KEITH MFG. CO., INC., AND KEITH SALES CO., *Plaintiffs-Appellants*,

v.

HALLCO MANUFACTURING CO., INC., OLOF A. HALLSTROM, AND ROBERT MARTIN SNELLMAN, *Defendants*.

Sept. 14, 1993.

Ted E. Runstein
Kell, Alterman & Runstein
Portland, Or.
Delbert J. Barnard
Glenn D. Bellamy
Barnard, Pauly, Kaser & Bellamy
Seattle, Washington, for plaintiffs.

Peter E. Heuser
David A. Fanning
Kolisch, Hartwell, Dickinson, McCormack & Heuser
Portland, Oregon, for defendants.

OPINION

FRYE, District Judge:

Plaintiffs, Raymond Keith Foster, Keith Mfg. Co., Inc., and Keith Sales Co. (collectively, "Foster"), brought this action against the defendants, Hallco Manufacturing, Co., Inc., Olof A. Hallstrom, and Robert Snellman (collectively "Hallco"). The matter before the court is the motion of Hallco for a new trial and for relief from judgment (# 518).

Following the presentation of evidence and the argument of counsel, the jury was instructed to answer seventeen interrogatories. Interrogatory No. (13) provides as follows:

Did Foster prove by clear and convincing evidence that Hallstrom failed to disclose the best mode known to him when he filed the application which became the '760 patent, as to either claim 1 or claim 4 of the '760 patent....

The jury answered "yes" to Interrogatory No. (13) as to both claim 1 and claim 4.

Interrogatory No. (17) provides as follows:

Do you find that [Keith] Foster tried to willfully mislead the court and jury with respect to the drive unit, identified as plaintiffs' exhibit 162, the drive unit

which Foster contends represents the 1973 45-foot Wilkens drive unit?

The jury answered "yes" to Interrogatory No. (17).

Foster objected to the inclusion of Interrogatory No. (17). In his argument for the submission of Interrogatory No. (17) to the jury, counsel for Hallco stated as follows:

Interrogatory number 17 talks about the drive unit itself. We believe that was altered intentionally to deceive, and so we want the jury to make a determination on those two points. It's very relevant, especially to two things.

If this case is an exceptional case under the patent statutes, defendants can be awarded attorneys' fees if the Court deems it proper. Additionally, if defendant prevails, there's a possibility of an injunction. That's equitable relief and any conduct by Mr. Foster through the course of the trial should be considered in determining equitable relief. And so these factual findings which [sic] serve as the basis for both exceptional case and injunctive relief; therefore, they're completely relevant.

Transcript of Jury Trial Proceedings, Vol. 16, pp. 2921-2922.

When asked by the court what were the consequences if the jury returned an answer of "yes" to Interrogatory No. (17), counsel for Hallco stated, "Then Your

Honor has a basis for deciding whether the case is exceptional and for considering an injunction." Id. at 2926.

CONTENTIONS OF THE PARTIES

Hallco moves for a new trial on the issue of the disclosure of the best mode.

Alternatively, Hallco seeks a new trial as to all matters concerning the '760 patent. Hallco contends that the jury's answer to Interrogatory No. (17) regarding fraud and misconduct on the part of Foster relating to the drive unit in the 1973 Wilkens trailer warrants a new trial because Hallco was deprived of an opportunity to fully and fairly litigate the issue of the best mode known.

Foster contends that he did not willfully mislead the court, but that even if the court finds that he did, a new trial is not warranted.

APPLICABLE STANDARD

The parties agree that the controlling law is the law of the United States Court of Appeals for the Ninth Circuit. See Amstar Corp. v. Envirotech Corp., 823 F.2d 1538, 1550 (Fed.Cir.1987). To receive a new trial under Fed.R.Civ.P. 60(b)(3), "the moving party must establish that a judgment was obtained by fraud, misrepresentation, or misconduct, and that

the conduct complained of prevented the moving party from fully and fairly presenting the case." In re M/V Peacock, 809 F.2d 1403, 1404-05 (9th Cir.1987). This is a two-prong test. Hallco must first establish the fraudulent act by clear and convincing evidence. Jones v. Aero/Chem Corp., 921 F.2d 875, 878-79 (9th Cir.1990). Hallco must then prove that the fraudulent act prevented Hallco from fully and fairly presenting its case or defenses. Id. at 879.

ANALYSIS

The jury found that "Foster tried to willfully mislead the court and jury with respect to the drive unit ... which Foster contends represents the 1973 45-foot Wilkens drive unit." Interrogatory No. (17). No standard of proof was provided in Interrogatory No (17); therefore, the court cannot conclude that the jury made this finding by clear and convincing evidence. Moreover, the court does not separately find that Hallco has shown by clear and convincing evidence that Foster willfully attempted to mislead the court and the jury.

See Instruction No. 14 (defining "clear and convincing evidence").

Hallco contends that the jury "had been asked to apply and rely on perjured testimony." Defendants' Memorandum in

Support, p. 3. The jurors were instructed orally and in writing to determine the true facts. They were told that they could believe or disbelieve all or any part of the testimony of any witness, and that if a witness had intentionally given false testimony in some part, they may distrust the rest of that person's testimony. See Instructions Nos. 3, 6 and 8. The jury was never instructed specifically or by inference to apply or rely on false testimony.

Hallco argues now that it is entitled to a new trial based on the jury's answer to Interrogatory No. (17). However, at trial, Hallco represented to the court that an affirmative answer to Interrogatory No. (17) would provide the court only with "a basis for deciding whether the case is exceptional and for considering an injunction." Transcript of Jury Trial Proceedings, Vol. 16, p. 2926. The court would not have submitted Interrogatory No. (17) to the jury had it known that Hallco would argue that the verdict should be set aside because Interrogatory No. (17) had been submitted. As counsel for Foster put it, "[I]f we were to submit a special interrogatory on every single potential contradiction of testimony in this trial, there would be hundreds [of special interrogatories] and many, many of them would be directed to Mr. Hallstrom's statement." Id. at 2922.

CONCLUSION

The jury did not find, by clear and convincing evidence, that Foster willfully intended to mislead the jury or to mislead the court. Moreover, the trial tactics and strategy of Foster did not deny Hallco an opportunity to fully and fairly present its case or defenses. Hallco has not met its burden to show that it is entitled to a new trial or to relief from judgment. Accordingly, the motion of Hallco for a new trial and for relief from judgment (# 518) is denied.

APPENDIX C
List of Supreme Court's Rule 60(b) Cases

The following is a list of the Supreme Court cases that have substantively addressed Rule 60(b):

* Pioneer Inv. Services Co. v. Brunswick Associates Ltd. Partnership, 507 U.S. ____, 113 S.Ct. 1489, 123 L.Ed.2d 74 (1993). Dealt with defining "excusable neglect" under Rule 60(b);
* Rufo v. Inmates of Suffolk County Jail, 502 U.S. _____, 112 S.Ct. 748, 116 L.Ed.2d 867 (1992). Dealt with Rule 60(b)(5) regarding relief from final decree when it is no longer equitable;
* Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847, (1988). - 60(b)(6): Regarding relief from judgment based on a judges appearance of non-impartiality;
* Kirby Forest Industries, Inc. v. U.S., 467 U.S. 1, (1984). - Rule 60(b) was interpreted to be available to party to challenge value of a condemnation award;
* James v. U.S., 459 U.S. 1044, (1982). - This memo noted an analogy between Rule 60(b) and a motion to reduce sentence in a criminal case;
* Browder v. Director, Dept. of Corrections of Illinois, 434 U.S. 257

(1978). - A timely appeal may be taken from a ruling on a Rule 60(b) motion;

* Standard Oil Co. of California v. U.S., 429 U.S. 17, (1976). - Court notes the abolishment of the requirement that leave be obtained from the appellate court before a lower court can entertain a Rule 60(b) motion;
* Pitchess v. Davis, 421 U.S. 482, (1975). - Rule 60(b): The State failed to provide exculpatory evidence to defendant;
* Forman v. Davis, 371 U.S. 178, (1962). - Court treated a Rule 60(b) motion as a Rule 59(e) motion;
* System Federation No. 91, Ry. Emp. Dept. v. Wright, 364 U.S. 642, (1961). - Court issuing an injunction has the power to modify it if a change in circumstances, law or fact, make it appropriate;
* Polites v. United States, 364 U.S. 426, (1960). - Party is not entitled to the grant of a 60(b) motion on the ground of change in the law under the circumstances of the case;
* Ackermann v. U.S., 340 U.S. 193, (1950) - Rule 60(b)(1) and 60(b)(6): regarding failure of party of appeal from a judgment of denaturalization;
* Klapprott v. United States, 335 U.S. 601 (1949), modified 336 U.S. 942, -

Rule 60(b) can be used to overturn a default judgment; and

* Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, (1944). - Regarding the "fraud on the court" saving provision of Rule 60(b): Party committed "fraud on the court" by falsely attributing a highly complimentary article on their patent to disinterested party (when they actually had bribed him).

Supreme Court, U.S.
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No. 94-792

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

HALLCO MANUFACTURING, CO., INC.
and OLOF A. HALLSTROM, *Petitioners*,

v.

RAYMOND KEITH FOSTER, KEITH MFG. CO.,
INC. and KEITH SALES CO., *Respondents*.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Federal Circuit

RESPONDENTS' BRIEF IN OPPOSITION

Delbert J. Barnard
Counsel of Record
Glenn D. Bellamy
BARNARD PAULY & BELLAMY P.S.
P.O. Box 58888
Seattle, WA 98138-1888
(206) 246-0568
Counsel for Respondents

November 30, 1994

QUESTIONS PRESENTED

Respondents (collectively "Foster") object to the questions presented for review by Petitioners (collectively "Hallco") for the reason that the questions are not supported by the record. Foster believes that the questions should be as follows:

1. Whether a party requesting relief from judgment under Rule 60(b), based on alleged fraud or other misconduct of an adverse party, must prove the alleged fraud or other misconduct by clear and convincing evidence?

2. Whether, with respect to a jury verdict that a party "tried to willfully mislead the court and jury", based on an interrogatory that did not include a "clear and convincing" standard of proof, it is an abuse of discretion for a trial court to hold that "the court cannot conclude that the jury made this finding by clear and convincing evidence" and further hold that the party alleging fraud has not shown by "clear and convincing" evidence that the adverse party had "willfully attempted to mislead the court and the jury"?

3. Whether a party whose patent is found to be invalid for failure to disclose the "best mode" can seek a new trial under Rule 60(b), limited to the "best mode" issue, based on alleged fraud or misconduct of the adverse party with respect to a trial exhibit having no relationship to the "best mode" issue, without demonstrating that such party has a substantial "best mode" case to present?

LIST OF ALL PARTIES

All parties to the proceeding are identified in the caption. Pursuant to *Supreme Court Rule* 29.1, petitioners state there are no parent or subsidiary companies to be listed.

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I. STATEMENT OF THE CASE

A. OVERVIEW

Hallco has in its Petition both misstated and understated the district court record. In Hallco's "Questions Presented," the statements "there is uncontroverted *prima facie* evidence that an adverse party willfully altered a key trial exhibit," "such misconduct affected the trial" and the "trial court [gave] no weight to a jury verdict that an adverse party willfully altered a key trial exhibit in an attempt to mislead the court and jury" are not supported by the record. In its Petition, Hallco makes no mention of the jury's finding that Foster proved "by clear and convincing evidence that the 1973 drive mechanism in the Wilkens 45-foot trailer move[d] the slats in a 1-2-3 motion." References herein to "A" are to the Joint Appendix of the present action on appeal before the Court of Appeals for the Federal Circuit.

B. OMITTED MATERIAL FACTS

Following a five-week trial held in October and November of 1992, a jury returned a verdict which included "yes" answers to Interrogatories Nos. 13 and 15 which read:

> Interrogatory No. 13: Did Foster prove by clear and convincing evidence that Hallstrom failed to disclose the best mode known to him when he filed the application which became the '760 patent, as to either claim 1 or claim 4 of the '760 patent? (A 1247)
>
> Interrogatory No. 15: Did Foster prove by clear and convincing evidence that the 1973 drive mechanism in

> the Wilkens 45-foot trailer moved the slats in a 1-2-3 motion, and included a one-way mechanical coupling, in the form of pull blocks on the push rods, for insuring simultaneous movement of all slats in the conveying direction? (A 1249)

and a "no" answer to Interrogatory No. 16 and a "yes" answer to Interrogatory No. 17 which read:

> Interrogatory No. 16: Do you find that Foster tried to mislead the court in his 1991 affidavit, Defendant's exhibit 671, with respect to the 1973 45-foot Wilkens drive unit? (A 1250)

> Interrogatory No. 17: Do you find that Foster tried to willfully mislead the court and jury with respect to the drive unit, identified as plaintiff's exhibit 162, the drive unit which Foster contends represents the 1973 45-foot Wilkens drive unit? (A 1251)

The "yes" answer to Interrogatory No. 17 is what promoted Hallco to file a motion for relief from judgment under Rule 60(b).

1. Best Mode. Foster's "Best Mode" evidence was for the most part the testimony of the patentee Olof A. Hallstrom ("Hallstrom"). With respect to the "drive means" disclosed in the '760 patent, Hallstrom testified:

> If I would consider this to be a machine drawing, a drawing for production as opposed to a schematic drawing, I would not do it this way, no. (A 1443)
>
> * * * * *
>
> The illustration of pin 30 there is simply a means of connecting. It's simply one of many means of

> connecting. In actual practice, I believe most of these are connected rigidly by one means or another. (A 1446)

Hallstrom testified that in actual practice the system included a "push rod" about which he stated:

> It is an extending arm which serves a dual purpose. It helps to resist rotational forces upon the transverse drive beam. It also provides for the placement [sic] of abutment[s]. (A 1447)

In further regard to the disclosed pivot pin connections, Hallstrom testified:

> In actual practice a pivot pin was not used there. (A 1449)
>
> [T]here was no point in it being pivotal. In fact, it would be ***detrimental***. Therefore, the connection was more of a rigid nature. (A 1449)
>
> [I]t's ***desirable*** to reduce the tendency of the crossdrive to roll . . . by having some of the rolling effect taken up through a push rod and not being supported only by the deck. (A 1450)

The '760 patent includes the statements:

> Another important object of this invention is to provide a reciprocating conveyor of the class described in which the fluid pressure drive system is formed of commercially available components and therefore is of minimum cost. (A 657)

* * * * *

> Moreover, the conveyor includes a fluid pressure drive system composed of commercially available components. The cost of manufacture, maintenance and repair thus is reduced to a minimum. (A 660)

At trial, Hallstrom testified that the hydraulic cylinders with check valves built into them, disclosed only schematically in the '760 patent, were ***not*** commercially available. (A 1457-58) He further testified that it took him a substantial time to develop a suitable check valve. (A 1458)

Prior to the filing of the '760 application, Hallstrom started using a hydraulic switching valve known as the Dupar Dynamics "Walton" or "Rothrock" valve. (A 623-27, 670, 1636-43) This switching valve was not disclosed in the '760 patent, but instead an air system valve was disclosed. With respect to the air system valve, Hallstrom testified:

> It worked up to the point that the operators would keep their air systems to the trailer working properly. But if there was not air pressure available then ***the system left a little to be desired.*** (A 1454)
>
> * * * * *
>
> There is also [a] question in my mind of the possibility of an air leak developing in the system which could take the air away from the air brakes of the vehicle and ***I got concerned*** over the possibility of liability in the event that brakes should fail. (A 1455)

Hallstrom was asked and he answered:

> Q And so what did you do in response to that concern?
>
> A We made this valving totally hydraulic so it operated off of the oil hydraulic system.

Q Now, that's a reference to the use of the Dupar Dynamics valve which has also been referred to as the Walton valve or the Rothrock valve?

A Yes (A 1455-56)

Hallstrom further stated:

> The Rothrock valve was an internally hydraulical[ly] activated valve which caused it to operate a little like a wall switch that, [being] it's one way or the other way; and ***it's a very desirable type of valve for our application.*** (A 670)

Lee H. Jones, a Hallco dealer, testified that the air control valves never worked and had to be replaced by the "hydraulic switching valve", i.e. "a mechanical switching device that's all done in oil." (A 1259-63, 1433-36) Mr. Jones referred to the hydraulic switching valve as "one great improvement." (A 1437)

In December of 1974, prior to the filing of the '760 application in January of 1975, Hallstrom wrote a letter to a prospective customer in which he stated:

> We have now completed the major part of our R and D and will soon be ready to market our product.
>
> There are presently twenty (20) units working in a wide variety of materials under all types of weather conditions. From this experience ***we have developed a closed hydraulic system free of external controls*** (electric, etc.). (A 1674)

Based on this evidence, the jury found that Hallstrom had not disclosed the "best mode". (A 476) Hallstrom did not appeal the district court's holding that claims 1 and 4 were invalid for failure to disclose the best mode. There is no connection between the "best mode" issue and PX 162, the drive unit referred to in Interrogatory No. 17.

2. The Wilkens 1973 Trailer. At trial, four people testified that in 1973 the drive mechanism in the Wilkens 45-foot trailer moved the slats in a 1-2-3 motion and included a one-way mechanical coupling in the form of pull blocks on the push rods for insuring simultaneously movements of all slats in the conveying direction. These people were respondent Raymond Keith Foster ("Keith"), Art Wilkens, Chuck Wilkens and Darryl Oakley.

Keith and Art Wilkens testified that prior to acquiring the 45-foot trailer, Art Wilkens had purchased from Keith a truck which included an "inch" system conveyor. (A 1503, 1310-11) Based on his experience with the "inch" conveyor, Art Wilkens requested that the trailer be furnished with a longer stroke conveyor. (A 1312-13) Keith passed this request on to Hallstrom who then delivered the 1-2-3 drive unit (PX 162) to Keith. (A 1502-03) Keith installed the drive unit in the trailer. Darryl Oakley, a South Dakota trucker, testified that he was hired by Art Wilkens to pick up the trailer and deliver it to Art Wilkens in Kansas. (A 1313) Darryl Oakley first took the trailer to his home in South Dakota and used it thirty-seven times before delivering it to Art Wilkens. (A 1398) During cross-examination Hallco's attorney suggested to Darryl Oakley that the conveyor was an "inch" system conveyor. (A 1412-13) Darryl Oakley answered that he knew nothing about the "inch" system conveyor; he was only familiar with the 1-2-3 motion conveyor. (A 1413) Art Wilkens and his son Chuck Wilkens testified that they both

used the trailer. (A 1316, 1370) After a while, they experienced trouble caused by electrical control components getting dirty. (A 1316) At times they had to manually operate the control system. (A 1317-18, 1371-72) They did this by detaching wires and tapping them on the trailer frame to make the system operate. (A 1316-18, 1371-72) At trial, Art Wilkens demonstrated this procedure with PX 162. (A 1333-35)

Keith testified that because of the problems experienced by Art and Chuck Wilkens with the electrical control system, he sought to develop a mechanical/hydraulic control system that would duplicate the 1-2-3 motion. (A 1540-42) In the latter part of 1973, Keith had Dupar Dynamics design for him two mechanical/hydraulic systems for powering a reciprocating slat conveyor, one in a 1-2-3 and the other in a 1-2-3-4 motion. (A 561, 572, 1540-42) In early 1974, Keith obtained a 1-2-3-4 system design from Paul Monroe, a hydraulic design shop located in California. (A 1542) In March of 1974, Keith bought a 1-2-3-4 control system from Dupar Dynamics and installed it in a trailer which he had built for the Three-Way Cattle Company. (A 382, 564-69, 1540-41) This system did not work properly. (A 1541) In April of 1974, Foster made and installed a working drive system that is presently in the Three-Way Cattle Company trailer. (A 1541-52) At trial, Don Tonnagel and Richard Lawson of Dupar Dynamics testified about their helping Keith develop a mechanical/hydraulic control for 1-2-3 and 1-2-3-4 conveyors, starting in late 1973. (A 1290-1300, 1300-04) Their testimony was supported by drawings of these systems and purchase records of hydraulic components by Keith from Dupar Dynamics. (A 559-72) A drawing of the Paul Monroe 1-2-3-4 system design was also introduced at trial. (A 573)

Regarding PX 162, during trial Keith was asked and he answered:

Q Mr. Foster, with respect to this Exhibit 162 that you've been looking at. Did you make any changes in substance to the mechanism that causes the one, two, three operation to occur?

A No.

Q The changes were making cylinders unstick or warped cylinders work and that sort of thing?

A Stuck valves to become unstuck and limit switches had to make contact where they were corroded.

Q You made reference to a Model T. If you were to in 1992 find an old Model T that had been sitting around, would you have to do some cleaning up and things with it to get it to work so you could show someone how it works?

A Yes, we would. In fact I did that many years ago.

Q That's in effect what you did with this drive in front of us?

A That's right. (A 1601-02)

Based on this evidence, the jury answered "yes" to Interrogatory No. 15., i.e. found that Foster had proved by clear and convincing evidence that the 1973 drive mechanism in the Wilkens 45-foot trailer moved the slats in a 1-2-3 motion, etc. (A 1249, 523)

3. Keith's 1991 Affidavit. In August of 1991, Foster filed a motion for summary judgment in which he contended *inter alia* that, "If claims 1 and 4 are construed broadly enough to embrace the RF II conveyor, they would also embrace the Wilkens '73 trailer and thus be invalid." This motion was supported by an affidavit from Keith in which he described the 1-2-3 mode of operation of the conveyor in the Wilkens trailer and made reference to photographs and drawings of PX 162. (A 1675-93) Keith's affidavit was corroborated by affidavits from Art Wilkens, Chuck Wilkens and Darryl Oakley. (A 1694-1702, 1714-16) The district court found that there were questions of material fact and for this reason denied the motion.

With respect to Keith's affidavit, at trial Hallco's attorney questioned Keith and he answered:

> Q Okay. So when you say Exhibit L, M, N, O, P are photographs of the 1973 drive mechanism for the conveyor in the Wilkens '73 trailer, you were referring to this drive mechanism, correct?
>
> A That's what I - - we thought so when we wrote this up.
>
> Q Okay. And you didn't say anything in this [affidavit] and you didn't say anything until yesterday about the fact that this was more or less an assemblage of parts from other prior units?
>
> A At one point, we started here with - - we had five model T's out in the back. We had to make some of them run. And so the parts - - or some of them were wrong on one and some wrong on another. I thought

we did a marvelous job of getting two of them to run.

Q You did a marvelous job of getting one of them to run in the one, two, three motion, but you never told the Court and you never told anyone until yesterday that this wasn't the same unit, did you?

A It's basically the same unit. Now, I told you there was a mistake made by some of our men that they lost some of the parts. At one time we took them and cleaned. I told them to clean them up and steam clean them, and some of the parts were lost. (A 1599-1600)

During redirect Keith was asked and he answered:

Q Now, the substance of your affidavit that you made, the affidavit you've been questioned about, is that in substance correct?

A The substance is correct. I'm not sure everything about it is perfect, but in substance it's correct. (A 1602)

Based on the testimony of Keith and the corroborating testimony of Art Wilkens, Chuck Wilkens, Darryl Oakley, Don Tonnagel and Richard Lawson, and the corroborating exhibits, the jury answered "no" to Interrogatory No. 16, i.e., found that Foster did not try to mislead the court in his 1991 affidavit with respect to the 1973 45-foot Wilkens drive unit. (A 1250, 523)

4. PX 162. Foster sought and obtained the court's permission to demonstrate PX 162 and some other prior art

devices to the court and jury. The demonstrations were held in a rented building that was several blocks from the courthouse. The time allotted for the demonstrations was limited. Therefore, Foster first presented the testimony of Art Wilkens who testified with respect to PX 162 and another exhibit and demonstrated PX 162. (A 1324-35) Art Wilkens also demonstrated how back in 1973 he detached a pair of control wires and tapped them on the trailer frame to make the drive unit work. (A 1333-34) Near the end of the day, the district court judge requested that the parties finish taking testimony in the courtroom. (A 1357-59) In response, Hallco's attorney asked the court for permission to ask Keith some questions regarding PX 162 and another exhibit before returning to the courtroom. (A 1358-59) The district court granted his request. (A 1358) Thus, Keith was in effect cross-examined with respect to PX 162 before he presented direct testimony regarding these exhibits. It was during this examination that Keith first testified that PX 162 had to be restored in order to make it work. (A 1360-65) Later during examination by his own attorney, Keith was asked and he answered:

> Q Yesterday you had some cross-examination in effect on this before you had any direct questioning - - .
>
> A Okay.
>
> Q --about it. And it's correct that it's your testimony that this unit or [a] unit basically similar, something that had the working parts but maybe different cylinder parts, was in that 1973 Wilkens trailer when it was picked up by Mr. Oakley?
>
> A Yes, sir. (A 1513)

During questioning by Hallco's attorney, Keith testified that in order to make PX 162 work his workmen had to take the drive unit apart and clean it and had to replace some of the electrical components and a warped cylinder. (A 1360-65, 1601-02) The replacement cylinder was identical to the original cylinder and it came from an old "inch" system drive unit. (A 1506-09) Keith also testified that one of his workmen reassembled PX 162 with angle iron base members from one of the other drive units and the original base members were lost. (A 1361-62) These base members were identical to the original base members except for the placement of some mounting holes. As previously stated, Keith was asked by Foster's attorney and he answered:

> Q Mr. Foster, with respect to this Exhibit 162 that you've been looking at. Did you make any changes in substance to the mechanism that causes the one, two, three operation to occur?
>
> A No. (A 1601)

It has always been Keith's position that when he obtained PX 162 from Hallstrom back in 1973, it came with the 1-2-3 mode of operation. If PX 162 was changed from an "inch" motion to a 1-2-3 motion, it was done by Hallstrom back in 1973.

As its last witness on the last day for taking testimony, Hallco presented Hallstrom to testify with respect to PX 162. (A 1083-1101) Hallstrom pointed out to the jury that a cam plate had been removed from a control bar in PX 162 and there was "shiny" metal where the cam plate had once been attached. Hallstrom also made reference to a "milled out" region in a guide member in PX 162. (A 1092-93) Hallstrom suggested that this member belonged on DX 673, an "inch"

system drive unit and that a like member on DX 673 which did not include a "milled out" portion belonged on PX 162. (A 1091-92) Hallstrom did not say that he had actual knowledge that Keith or someone else associated with Foster had removed the cam from the control rod.

With respect to the main issue regarding PX 162, viz. what was its mode of operation in 1973, the jury did not believe Hallstrom; it instead believed Keith. (A 1249, 523) The jury found that Foster had by "clear and convincing evidence established that the 1973 drive mechanism in the Wilkens 45-foot trailer moved the slats in a 1-2-3 motion" (Interrogatory No. 15). (A 1249, 523) The jury believed Keith's 1991 affidavit testimony that the slats in the Wilkens trailer had a 1-2-3 motion in 1973 (Interrogatory No. 16). (A 1250, 523)

5. Foster's Trial Strategy. Foster's trial strategy was to inform Hallco early as to the witnesses and exhibits Foster would be using at trial with respect to all of the issues. This was done in order to determine which issues would be in dispute well before trial. Foster first put Hallco on notice that Foster was going to be relying on PX 162 and the testimony of Keith, Art Wilkens, Chuck Wilkens and Darryl Oakley, back in August of 1991, when Foster filed its motion for summary judgment. (A 27, items 271-73) In the Pretrial Order, Foster defended Hallco's charge of infringement by contending *inter alia*:

> (3) Claim 1 is invalid, if construed broadly enough to cover the RF II conveyor because it would then also embrace the prior art Marion conveyor that was demonstrated in the January 1974 show, the prior art 45-foot conveyor sold to Wilkens in 1973, the prior art conveyor that was delivered by FOSTER to the Three-

Way Cattle Co. in April of 1974, and the prior art conveyor that was delivered by FOSTER to Howard Hay Co. in April of 1974.

* * * * *

(6) Claim 4, if construed broadly enough to cover the RF II conveyor, would be invalid because it would then also embrace the prior art 45-foot conveyor sold to Wilkens in 1973, the prior art Three-Way Cattle Co. conveyor that was delivered by FOSTER to the Three-Way Cattle Co. in April of 1974, and the prior art conveyor that was delivered by FOSTER to Howard Hay Co. in May of 1974.

(7) Claims 1 and 4 are invalid, if construed broadly enough to cover the original conveyor sold to IMCO and leased to Oakley in July of 1974, the prior art 45-foot conveyor sold to Wilkens in 1973, and/or the replacement conveyor that was built in 1974 and furnished to Oakley in November or December of 1974, because HALLSTROM would have failed to disclose the best mode know to him at the time he filed the patent application in January of 1975. (A 42, item 422)

6. Hallco's Trial Strategy. In the Pretrial Order, Hallco's sole contentions regarding validity of the '760 patent were:

(2) The '760 patent is presumed valid, so Hallco needs to make no showing as to validity or enforceability. However, Foster is barred by the 1982 settlement from asserting invalidity or unenforceability.

(3) In the event Foster asserts invalidity of the '760 patent, Hallstrom's conception of the invention preceded alleged prior art Foster is contending invalidates the '760 patent. (A 42, item 422)

In June of 1992, Hallstrom and Hallco's attorney went to Foster's plant in Madras, Oregon and witnessed a demonstration of PX 162 and two other drive units. (A 1619) However, between August of 1991 and the start of trial Hallco did not depose Keith, Art Wilkens, Chuck Wilkens or Darryl Oakley, or take any other discovery with respect to PX 162 or the Wilkens trailer.

During the last week of trial, Hallco's attorney initiated several discussions with the court with respect to the division of the remaining testimony time between the parties. His main concern was that he have the last two hours of time on the last day of taking testimony in which to present final rebuttal testimony. (A 1531) He did not at any time inform the court that he needed additional time and he did not ask for a continuance. To the contrary, he told the court, "I think we're moving along real well now." (A 1488) On the last day of trial he stated to Foster's attorney, "Why don't you have an extra half hour this afternoon . . . as long as I have after 2 o'clock." (A 1531)

As previously stated, during the last two hours on the last day for taking testimony, Hallco presented Hallstrom as a witness with respect to PX 162. (A 1083-1101) During his testimony Hallstrom made allegations that someone had altered PX 162. Hallco's attorney has since contended that the alterations were the product of fraud or misconduct by Keith.

On that last day of taking testimony, Hallstrom testified that in June of 1992 he saw the "shiny" metal when he was at Foster's plant viewing operation of PX 162. (A 1619-20) During trial, he was asked and he answered:

Q You never pointed it out at that time?

A I would have, but Pete shut me up. (A 1619-20)

"Pete" is Peter E. Heuser, Hallco's attorney. In a trial memorandum, Hallco stated that it did not make PX 162 an issue in the Pretrial Order because Hallco assumed all along that Foster had a reasonable explanation for the "shiny" metal. (A 1850)

Hallco did not present Interrogatories Nos. 16 and 17 to the court until after the completion of testimony. (A 46, item 481)

C. MISSTATEMENTS

Key misstatements made in the Petition are:

1. There is uncontroverted *prima facie* evidence showing "fraud" in the form of a willful alteration of PX 162 to change its mode of operation,

2. Foster has not presented any explanation as to removal of the cam plate, the presence of "shiny" metal, the presence of a milled out portion in a guide member in PX 162, and Sam Windsor's testimony that shortly before trial he inspected "another drive unit" which operated in the 1-2-3 mode,

3. Hallco presented uncontroverted *prima facie* evidence that misconduct by Foster affected Hallco's presentation of its case,

4. The trial court gave no weight to the jury's "yes" answer to Interrogatory No. 17, and

5. The trial court failed to address the affect of Foster's conduct on "the integrity of the judicial process."

In response:

1. No *Prima Facie* Showing. At trial, Hallstrom contended that Keith had altered PX 162 shortly before trial, to change its mode of operation, and in the process removed a cam plate, leaving "shiny" metal where the cam plate had been attached. Keith countered by stating that when he received PX 162 from Hallstrom in 1973 it had a 1-2-3 mode of operation. Keith's testimony was corroborated by Art Wilkens, Chuck Wilkens and Darryl Oakley, each of whom had first hand knowledge of how PX 162 operated in 1973. It is Foster's position that if PX 162 is a modified "inch" system drive unit, the modifications were made by Hallstrom back in 1973, before the drive unit was delivered to Foster.

2. The Cam Plate. Foster agrees that a cam plate was removed from a control bar in PX 162. However, Keith testified that he did not remove the cam plate. It is Keith's position that the cam plate was removed back in 1973 before the drive unit was delivered to Keith.

3. The "Shiny" Metal. It is undisputed, PX 162 was restored and operated in August of 1991 and at that time Foster took pictures of PX 162 in operation that became exhibits in Foster's Motion for Summary Judgment. It is also undisputed, PX 162 was demonstrated to Hallstrom and his attorney in June of 1992. There is testimony by Foster that PX 162 had been stored outside at times between August of 1991 and shortly before trial. There was no testimony by anyone as to how the region of the control bar where a cam plate had once been attached became "shiny" on the last day of trial, only accusations by each side. However, Foster testified that PX 162 was steam cleaned shortly before trial.

This could be why the region in question was "shiny" on the last day of trial.

4. The "Milled Out" Portion. During his trial testimony and since, Hallstrom has suggested that the member which included the "milled out" portion had been interchanged with a like member in DX 673. On page 5 of its Petition, Hallco implies that the corresponding member in DX 673 includes a "milled out" portion. This is not true. The corresponding member in DX 673 does not include a "milled out" portion.

5. Sam Windsor's Testimony. Sam Windsor testified that before trial he inspected a drive unit that operated in the 1-2-3 mode, the same as PX 162. Sam Windsor did not say that the drive unit which he examined was a different drive unit. PX 162 was the drive unit that was inspected by Sam Windsor before trail.

6. Alleged Misconduct. There is evidence that Foster cleaned and restored PX 162 before demonstrating it at trial. There is evidence that Foster first demonstrated PX 162 and then presented testimony by Keith as to what restoration had to be done in order to make PX 162 workable. Based on all of the evidence, the trial court ruled that Hallco had not established misconduct by clear and convincing evidence.

7. Interrogatory No. 17. It is incorrect to say that the trial court gave no weight to the jury's "yes" answer to Interrogatory No. 17. The trial court considered the "yes" answer to Interrogatory No. 17 in light of the jury's "yes" answer to Interrogatory No. 15, the jury's "no" answer to Interrogatory No. 16, and the court's own evaluation of the evidence presented and the witness demeanor displayed during the trial.

8. Integrity Of The Judicial Process. The district court took Hallco's motion for relief for what it was; a desperation attempt by a losing party to reverse its loss. The trial court's ruling was a demonstration of "the integrity of

the judicial process." The district court thwarted an unwarranted attack on a "honestly procured judgment."

II. SUMMARY OF ARGUMENT

This is not an appropriate case for review on *certiorari*. There are no issues or conflicts of federal law requiring clarification or decision by this Court, and underlying factual issues were resolved against Petitioner.

A party requesting relief from judgment under Rule 60(b), based on alleged fraud or other misconduct of an adverse party, must prove the alleged fraud or other misconduct by clear and convincing evidence. Hallco is not contending that the burden of proof is less than "clear and convincing" or that there is a conflict amongst the circuits as to the burden of proof.

With respect to the jury verdict that Foster "tried to willfully mislead the court and jury", it was not an abuse of discretion for the trial court to hold that "the court cannot conclude that the jury made this finding by clear and convincing evidence." It was also not an abuse of discretion for the trial court to decide the question and rule that Hallco had not shown by "clear and convincing" evidence that Foster had "willfully attempted to mislead the court and jury." The trial court itself viewed the demonstration of PX 162 and witnessed the demeanor of all the witnesses.

It was not an abuse of discretion for the district court to rule that "the trial tactics and strategy of Foster did not deny Hallco an opportunity to fully and fairly present its case or defenses." The trial court was aware of Hallco's failure to take discovery as to PX 162 and was aware of Hallco's trial

conduct including its failure to ask for more time or request a continuance.

In making its rulings, the trial court did not ignore, but in fact considered, the jury's "yes" answer to Interrogatory No. 17. The trial court also considered Hallco's answers to Interrogatories Nos. 15 an 16 and took a view of the case which made the special interrogatories consistent.

Furthermore, Hallco is not entitled to relief from judgment with respect to the "best mode issue because Hallstrom has not attempted to show, and cannot show, the it has a substantial case to present with respect to the "best mode issue."

III. ARGUMENT

A. THERE ARE NO LEGAL ISSUES NEEDING RESOLUTION

As discussed above, the questions presented by Hallco are based on premises that are not supported by the record. The question of possible misconduct by Foster, and its affect on the trial, were hotly contested issues. After considering all of the evidence and argument presented by the parties, including the demonstration of and testimony respecting PX 162, and its observing the demeanor of the witnesses as they testified, the trial court ruled in favor of Foster as to Interrogatory 17. In the process, the trial court considered and gave proper weight to the jury's "yes" answer to Interrogatory No. 17.

The district court ruled, and the parties agreed, the controlling law respecting Hallco's motion for relief under Rule 60(b) is the law of the United States Court of Appeals

for the Ninth Circuit. Amstar Corp. v. Envirotech Corp., 823 F.2d 1538, 1550 (Fed. Cir. 1987). To receive relief under Rule 60(b), "the moving party must establish that a judgment was obtained by fraud, misrepresentation, or misconduct, and that the conduct complained of prevented the moving party from fully and fairly presenting the case." In re M/V Peacock, 809 F.2d 1403, 1404-5 (9th Cir. 1987). Hallco has made no attempt to show that there is a conflict among the circuits with respect to this two-prong test.

B. FRAUD OR OTHER MISCONDUCT MUST BE ESTABLISHED BY CLEAR AND CONVINCING EVIDENCE

In its decision denying Hallco's motion for a new trial and relief from judgment, the district court ruled:

> Hallco must first establish the fraudulent act by clear and convincing evidence. Jones v. Aero/Chem. Corp., 921 F.2d 875, 878-79 (9th Cir. 1990). In Jones, the Ninth Circuit Court ruled that "under Rule 60(b)(3), the movant must, (1) prove by clear and convincing evidence that the verdict was obtained through fraud, misrepresentation, or other misconduct", *citing* Bunch v. United States, 680 F.2d 1271, 1283 (9th Cir. 1982) which made the same holding.

Oregon law is the same. In Riley Hill General Contractor, Inc. v. Tandy Corp., 303 Or. 390, 392, 737 P.2d 595, 597 (1987), the Oregon Supreme Court stated:

> [w]e hold that the burden of persuasion for common law deceit requires the proponent to prove each of the elements of deceit by clear and convincing evidence.

In its decision, the Oregon court discussed the origins and meanings of "preponderance" and "clear and convincing" evidence and it made reference to a statement by then Chief Justice Warren Burger, in Addington v. Texas, 441 U.S. 418, 424 (1979), that one typical use of the "clear and convincing" standard is in "civil cases involving allegations of fraud or some other quasi-criminal wrongdoing."

Hallco has made no attempt to show that there is a conflict among the circuits regarding the burden of proof issue or that the burden of proof should be something other than "clear and convincing".

C. IT WAS NOT AN ABUSE OF DISCRETION FOR THE TRIAL COURT TO RULE THAT IT COULD NOT CONCLUDE THAT THE JURY HAD FOUND THAT FOSTER "TRIED TO WILLFULLY MISLEAD THE COURT AND JURY" BY "CLEAR AND CONVINCING" EVIDENCE

Hallco wrote Interrogatory No. 17 and is solely responsible for it not including the "clear and convincing" standard of proof. It was proper and not unreasonable for the district court to rule that it could not say that the jury applied the correct standard of proof. Whatever prompted the jury to answer "yes" to Interrogatory No. 17, it did not make the jury disbelieve either Foster's 1991 affidavit testimony or the evidence presented at trial which prompted the jury to answer "no" to Interrogatory No. 16 and "yes" to Interrogatory No. 15. The court correctly recognized that the jury's "clear and convincing" finding, in its answer to Interrogatory No. 15, constitutes a finding by the jury that the "tried to willfully mislead" conduct, whatever it was, was not material to the main fact question that the jury was asked to answer.

The Ninth Circuit requires trial and appellate courts to seek reconciliation of apparently inconsistent verdicts:

> "When faced with a claim that verdicts are inconsistent, the court must search for a reasonable way to read the verdicts as expressing a coherent view of the case, and must exhaust this effort before it is free to disregard the jury's verdict and remand the case for a new trial." Toner v. Lederle Laboratories, 828 F.2d 510, 512 (9th Cir. 1987), *cert. denied*, 485 U.S. 942 (1988), *citing* Gallick v. Baltimore & Ohio R.R., 372 U.S. 108, 119 (1963), *also see* Richardson v. Suzuki Motor Co., 868 F.2d 1226, 1228 (Fed. Cir. 1989).

> "Where there is a view of the case that makes the jury's answers to special interrogatories consistent, they must be resolved that way. For a search for one possible view of the case which will make the jury's finding inconsistent results in a collision with the Seventh Amendment." Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd., 369 U.S. 355, 364 (1962).

> "But it is the duty of the courts to attempt to harmonize the answers, if it is possible under a fair reading of them: 'Where there is a view of the case that makes the jury's answers to special interrogatories consistent, they must be resolved that way.'" Gallick v. Baltimore & Ohio R.R., 372 U.S. at 119, *citing* Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd., 369 U.S. at 364.

Quite clearly, the district court followed the mandate of these courts and took a view of the case which made the jury's findings consistent.

D. IT WAS NOT AN ABUSE OF DISCRETION FOR THE TRIAL COURT TO RULE THAT HALLCO HAD NOT SHOWN BY "CLEAR AND CONVINCING" EVIDENCE THAT FOSTER HAD "WILLFULLY ATTEMPTED TO MISLEAD THE COURT AND JURY"

Faced with Interrogatory No. 17, and its omission of the "clear and convincing" standard, and the vagueness of "tried to willfully mislead", the district court did the reasonable thing. That was to independently decide the question presented by Interrogatory No. 17, using the correct standard of proof. The jury was not furnished with any instructions as to the meaning of "willfully", "attempt" or "mislead" in relationship to "fraud" or "misconduct." Each juror was left to his or her own frame of reference as to what he or she thought amounted to "tried to willfully mislead." On the other hand, the district court judge had an understanding of what amounts to legal misconduct. She was present throughout the trial, she viewed the demonstration of PX 162, including the "shiny" metal on PX 162, and viewed DX 673 and witnessed the demeanor of Keith, Art Wilkens, Chuck Wilkens, Darryl Oakley, Don Tonnagel , Richard Lawson and Hallstrom as they testified. Under all of the circumstances, it was entirely reasonable for the trial court to rule that Hallco had not shown by clear and convincing evidence that Foster had intended to mislead the court and jury.

As stated by the Ninth Circuit in Atchinson v. Barrett, 246 F.2d 846 (9th Cir. 1957), a motion for relief of judgment or for a new trial, based on an allegation of misconduct, "is directed to the sound discretion of the trial court, and particularly to the discretion of the trial judge who presided in the litigation in which the judgment (now alleged as

fraudulent) was entered." Atchinson v. Barrett, 246 F.2d at 849 (citations omitted). The Atchinson court further stated:

> The trial judge saw and heard the plaintiff; saw his twitchings, what they were and what they were not, as did the jury. He saw or heard the other matters relied on by appellant; he felt the "climate" of the trial. The trial judge found no fraud nor misrepresentation. The Court of Appeals should not and will not substitute its judgment for that of the trial court, nor reverse the lower court's determination save for an abuse of discretion. Atchinson v. Barrett, 246 F.2d at 849.

Hallco has not attempted to show that there is a conflict amongst the circuits regarding this "sound discretion of the trial court" rule.

E. IT WAS NOT AN ABUSE OF DISCRETION FOR THE DISTRICT COURT TO RULE THAT "THE TRIAL TACTICS AND STRATEGY OF FOSTER DID NOT DENY HALLCO AN OPPORTUNITY TO FULLY AND FAIRLY PRESENT ITS CASE OR DEFENSES"

The trial court was aware that Hallco had been informed as early as August of 1991 of Foster's position with respect to PX 162 and that testimony would be coming from Keith, Art Wilkens, Chuck Wilkens and Darryl Oakley with respect to how PX 162 operated back in 1973. The trial court was aware of the unused pretrial opportunities of Hallco (1) to conduct discovery with respect to PX 162, (2) to make the alleged alteration of PX 162 an issue in trial by, before trial, adding this issue to the Pretrial Order, or (3) to take steps to exclude PX 162 from the trial. Also, the trial judge was present throughout the trial and was aware that Hallco did not

at any time ask for additional time to present testimony and it did not at any time ask for a continuance. The trial court was aware that Hallco's attorney informed it that "I think we're moving along real well now", etc.

Under the Ninth Circuit rule set forth in M/V Peacock, supra, because the trial court had found that Foster's judgment was not obtained by fraud, misrepresentation or misconduct, it was not necessary for the court to find that Hallco had not been prevented from fully and fairly presenting its case. In any event, the court proceeded to decide this issue. The trial court's finding that "the trial tactics and strategy of Foster did not deny Hallco an opportunity to fully and fairly present its case or defenses" is a ruling that is subject to the "sound discretion of the trial court" rule set forth in Atkinson. Hallco has not attempted to show that there is a conflict amongst the circuits regarding this rule or that this rule should not be followed for some other reason.

F. IN MAKING ITS RULINGS, THE TRIAL COURT DID NOT IGNORE BUT RATHER GAVE PROPER WEIGHT TO THE JURY'S "YES" ANSWER TO INTERROGATORY NO. 17.

On page 11 of its Petition, Hallco states:

> The question left completely unanswered, even by those circuits which have established Rule 60(b)(3) guideposts, is whether the presentation of uncontroverted *prima facie* evidence demonstrating fraud or misconduct requires the granting of a Rule 60(b) motion, or whether a court can, in its discretion, completely ignore uncontroverted evidence offered to prove fraud.

Firstly, this case does not involve "uncontroverted *prima facie* evidence demonstrating fraud or misconduct. The evidence argued by Hallco was controverted by Foster. Interrogatory 17 was prepared by Hallco and was directed to "tried" conduct. The jury ***was not*** asked to find and ***did not*** find that Foster committed "fraud" or that Foster committed "perjury", or that Foster "doctored" PX 162, or that Foster "manufactured evidence", or that Foster "destroyed and/or concealed evidence." The jury ***found*** that Foster ***did not*** try to mislead the court in his 1991 affidavit which included pictures of PX 162 and described PX 162 as having a 1-2-3 motion when he obtained it from Hallstrom in 1973 and installed it in the Wilkens trailer. The jury ***found*** that Foster ***proved*** by "clear and convincing" evidence that the 1973 drive in the Wilkens trailer moved the slats in a 1-2-3 mode and included pull blocks on the push rods. Hallco first asked the district court, then the federal circuit court, and now asks this Court to completely ignore these findings by the jury. Faced with the jury's answers to Interrogatories Nos. 15, 16 and 17, the district court followed the rule in Toner and "search[ed] for a reasonable way to read the verdicts as expressing a coherent view of the case." Thus, it was necessary for the district court to exercise its sound discretion when it was forced to consider the jury's "yes" answer to the "tried" conduct of Interrogatory No. 17 in light of the jury's finding that Foster had by "clear and convincing" evidence established that in 1973 the Wilkens conveyor moved the slats in a 1-2-3 mode and included pull blocks on the push rods.

G. HALLCO HAS NOT SHOWN THAT IT HAS A "BEST MODE" CASE.

Foster vehemently denies Hallco's contention that Foster changed the mode of operation of PX 162 and the trial court

found for Foster on this issue. But, in any event, there is no connection between PX 162 and the reasons why the jury found that Hallstrom had not disclosed the best mode.

In Restatements, Second, Judgments §70, at page 183, it is stated:

> Finally, the party seeking relief must demonstrate, before being allowed to present his case, that he has a substantial case to present . . ..

In its Petition, Hallco has made no attempt to establish that it has a best mode case to present. In its Brief to the Federal Circuit, Hallco stated:

> [O]ther than Mr. Foster himself, the only live witness testifying in support Foster's best mode defense was Darryl Oakley, who testified as to both best mode (A1050-53) and mode of motion of the early Wilkens trailer. (A1048-49)

This is a clear misstatement of the record. Foster's "best mode" defense is based on the testimony of Hallstrom discussed above starting on page 2 of this brief.

IV. CONCLUSION

Hallco's Petition should be denied because the case presents no issue appropriate for the court's review, and because the lower courts' holdings are not in error.

Respectfully submitted,

DELBERT J. BARNARD
WA State Bar No. 00415

GLENN D. BELLAMY
WA State Bar No. 17626

BARNARD, PAULY
& BELLAMY, P.S.
P.O. Box 58888
Seattle, WA 98138-1888
(206) 246-0568

Attorneys for Respondent

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No. 94-792

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

HALLCO MANUFACTURING, CO., INC.
and OLOF A. HALLSTROM, *Petitioners*,
v.
RAYMOND KEITH FOSTER, KEITH MFG. CO.,
INC. and KEITH SALES CO., *Respondents*.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Federal Circuit

PETITIONERS' REPLY BRIEF

Peter E. Heuser
Counsel of Record
David A. Fanning
Kasey C. Christie
KOLISCH HARTWELL DICKINSON
McCORMACK & HEUSER
520 S.W. Yamhill St., Suite 200
Portland, OR 97204
(503) 224-6655
Attorneys for Petitioners

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PETITIONERS' REPLY BRIEF

I. INTRODUCTION

The Respondents' (collectively "Foster") arguments highlight, by omission, why this Court should grant the Petition. Foster fails to cite any authority --because none exists-- to contradict the fact that: (1) in the entire fifty-six year history of Rule 60(b), this Court has *never* ruled on what standard the lower courts should use in determining whether to grant a motion

under Rule 60(b)(3); and (2) this Court has not in fifty years elaborated on the application of the "fraud on the court" saving provision of Rule 60(b). See, Hazel-Atlas Glass Co. v. Hartford Empire Company, 322 U.S. 238 (1944). In a misleading and largely irrelevant presentation of the facts, Foster attempts to divert the focus from the clear need for establishing legal guidelines. Contrary to Foster's argument, Interrogatory Nos. 13, 15 and 16 are irrelevant, the Petitioners' (collectively "Hallco") Petition is accurate that Foster never has presented evidence contradicting Hallco's evidence of alteration of PX 162 or that Foster's misconduct affected the trial, and the district court's opinion clearly shows that it gave no weight to the jury verdict that Foster altered the exhibit in attempt to mislead the court and jury.

II. FACTUAL MATTERS

A. The Other Jury Interrogatories are Irrelevant to this Petition.

Foster's discussion regarding the best mode and the other jury findings is irrelevant to present action. The only relevant argument is where Foster says that there is no connection between the best mode issue and the alteration of PX 162 (Brf in Opp 6), but even this argument

misses the point. The alteration of PX 162 affected Hallco's trial of its case which included the best mode issue. Uncontroverted evidence shows that Hallco's trial of its case was affected by having to deal with Foster's fraud, to the extent that Hallco did not spend sufficient time rebutting Foster's best mode evidence. Foster agrees that where fraud has been demonstrated and the trial has been affected by the fraud, a new trial is required under Rule 60(b)(3) and 60(b) saving provision.

B. The District Court's Handling of the Wilkins 1973 Trailer Jury Interrogatory Shows that it Knew there was Fraud, but the Court's Refusal to Enter that Verdict was an Insufficient Remedy for the Fraud.

Foster argues that Interrogatory 15 shows that the Hallstrom '760 patent is invalid, based upon a sale more than one year before the filing date of the patent (Brf in Opp 6-8). But the district court refused to enter this verdict as a part of its judgment, undoubtedly because it recognized that Foster's fraud permeated the presentation of the evidence on this point. However, the court's refusal to enter this verdict was an insufficient remedy. Because the uncontradicted evidence showed that Foster's fraud

affected the trial of Hallco's case, Hallco was entitled to a new trial.

C. The Jury's Verdict as to the 1991 Affidavit is Irrelevant.

Foster is correct that the jury refused to find that Foster engaged in fraud in the filing of a 1991 affidavit relating to the Wilkins 1973 trailer (Interrogatory No. 16). However, this is unrelated to the jury verdict that Foster fraudulently altered the trial exhibit. For example, the so-called "shiny spot" was not even evident in the photographs appended to the 1991 affidavit, so the jury was unable to determine whether the drive had been altered prior to the preparation of the 1991 affidavit.

D. Foster's Discussion of PX 162 is Misleading and Never Does Explain the Critical Shiny Spot.

Foster contends that PX 162 operated in the 1-2-3 mode back in 1973 (Brf in Opp 12). But if alterations to PX 162 resulted in a shiny spot, it is undisputed that the shiny spot would not remain twenty years later because the unit had been outside in the rain for most of that time (pp. 1094-95 of joint appendix for appeal to Court of Appeals for the Federal Circuit, hereinafter "A"). It is undisputed that Foster had sole custody of PX 162 during that entire time. The only

explanation presented by Foster during the trial was that of its attorney in his closing argument where he said that "we are concerned" and "[i]t bothered me to see that."

E. Foster's Contentions Regarding the Evidence of Alteration are Baseless.

Foster's contention that the testimony of various witnesses supports its position on PX 162 is totally without basis (Brf in Opp 17). Foster's argument with regard to the Wilkins 1973 trailer is based on its contention that PX 162 was the actual drive unit used in the Wilkins 1973 trailer; however, none of the witnesses (other than Foster himself) testified that PX 162 was the actual drive unit in that trailer.

With regard to the cam plate, it could not have been removed to reveal the shiny spot back in 1973, because even Foster agreed that the unit had been in the rain for almost twenty years.

Recognizing that the shiny spot could not have remained shiny for almost twenty years of exposure, Foster now contends that PX 162 was steam-cleaned shortly before trial. However, Hallco presented photographs at trial showing that the shiny spot existed some six months prior to trial. Nowhere in the evidence is there any explanation for this shiny spot other than the conclusion the jury

reached, that is, that the shiny spot was there because Foster broke off the cam plate to alter the drive unit to operate in the 1-2-3 mode of motion in the period preceding Hallco's inspection six months prior to trial. It could not have been later than that because of Hallco's photographs. It could not have been back in 1973 because it would not have remained shiny for so many years.

F. The District Court Gave No Weight to the Jury's Verdict That Foster Attempted to Mislead.

Contrary to Foster's argument, the district court clearly ignored Interrogatory No. 17 and made it's own finding when it said "the court does not *separately* find that Hallco has shown by clear and convincing evidence that Foster willfully attempted to mislead the court and the jury" (emphasis added). The court did not, as it should have, give deference to the jury verdict. The district court's failure to give any credence at all to the jury verdict undermines the integrity of the judicial process and the faith which jurors and others place in the system.

III. REPLY AS TO FOSTER'S LEGAL CONTENTIONS

A. Foster Presents No Evidence Contradicting Hallco's Evidence Showing the Effect of Foster's Misconduct.

In its Brief in Opposition, Foster does not discuss any evidence that contradicts Hallco's evidence that the trial of this case was affected. Hallco submitted evidence to the district court (including affidavit at A1148) that showed how Foster's misconduct substantially interfered with the trial of its case.

B. Response to Foster's Additional Questions.

Foster presents additional questions in its brief because it misunderstands the record and does not appreciate the legal issues raised in Hallco's Petition. Foster's questions are not supported by the record and distract this Court's attention from the key legal issues (raised in the Petition's questions presented) on which the Petition should be granted.

For the sake of completeness, however, Hallco will summarily respond to the questions noted at page i of Foster's Brief:

1. In Foster's first question, it asks if the clear and convincing standard

is a blanket requirement for fraud-related Rule 60(b) motions. The answer is no. No authority exists that establishes that the clear and convincing standard applies to Rule 60(b) "fraud on the court" motions.

Therefore, Interrogatory No. 17 finding misconduct was binding as to a Rule 60(b) "fraud on the court" motion (Pet 16-17). Foster presents no authority to contradict this conclusion.

2. Foster next asks if the district court abused its discretion. This question misses one of the points raised in Hallco's Petition that the district court lacked a defined standard to decide a Rule 60(b) motion when presented with uncontroverted *prima facie* evidence demonstrating misconduct (Pet 9-13).

As discussed *supra*, Foster contends that the testimony of various witnesses contradicts Hallco's *prima facie* showing of misconduct (Brf in Opp 17). However, in order for the testimony of these witnesses to support Foster's argument, PX 162 (the subject of the witnesses' testimony) must be the actual drive unit used in the Wilkins 1973 trailer. Foster is the only one who testified that PX 162 was the actual drive unit which was installed in that trailer. Therefore, the testimony of the other witnesses does not controvert Hallco's evidence of misconduct by Foster.

3. As to Foster's third question, it is not necessary for Hallco to show that there is a best mode case before a court can grant a new trial motion. Foster's sole support for its position is the Restatement, Second, Judgments § 70, but the language Foster quotes (Brf in Opp 28) is merely from the commentary to the Restatement which has never, to Hallco's knowledge, ever been adopted by any court in any jurisdiction.

IV. CONCLUSION

For the foregoing reasons, Hallco's Petition should be granted.

Respectfully submitted,

Peter E. Heuser
Counsel of Record
David A. Fanning
Kasey C. Christie
KOLISCH HARTWELL
DICKINSON McCORMACK
& HEUSER
520 S.W. Yamhill St.
Suite 200
Portland, Oregon 97204
(503) 224-6655
Attorney for Petitioners
Hallco Manufacturing,
Co., Inc. and Olof A. Hallstrom

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